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No. _____

In The
Supreme Court of the United States
October Term, 1988

LOUIS W. ROSZKOS and VIVIAN L. ROSZKOS,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI— FEDERAL INCOME TAX CASE

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QUESTIONS PRESENTED

Did the Court of Appeals err in holding that the notice of deficiency mailed by the Internal Revenue Service to the wrong address did not terminate the taxpayers' waiver of the statute of limitations on assessment of taxes?

Did the Court of Appeals err in holding that the assessment of taxes after issuance of the invalid notice of deficiency did not terminate the taxpayers' waiver of the statute of limitations?

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OPINION BELOW

The opinion of the Court of Appeals below (Appendix "A", *infra*) is reported at 850 F.2d 514 (1988). The opinion of the Tax Court below (Appendix "B", *infra*) was reported at 87 T.C. 1255 (1986).

JURISDICTION

The decision of the court below (Appendix "A", *infra*) was filed on June 20, 1988. Rehearing was sought

by a timely filed Petition on July 5, 1988. The order of the Court of Appeals denying the Petition for Rehearing was entered on August 5, 1988 (Order attached as Appendix "C"). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

———o———

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statutes and the waiver of the statute of limitations involved are set forth in Appendix "D", *infra*.

———o———

STATEMENT OF THE CASE

Petitioners Louis W. and Vivian L. Roszkos (the "Roszkos") filed joint federal tax returns for the years 1973 through 1976, reflecting losses incurred and investment tax credits claimed for certain partnerships of which they were members. The Internal Revenue Service ("IRS") audited the Roszkos' returns for these years. In 1977, at the request of the IRS, the Roszkos executed the first of a series of waivers (Forms 872), consenting to a limited extension of the ordinary three year statute of limitations of tax deficiencies. Eventually, in late 1981, the Roszkos executed Forms 872-A for tax years 1973 and 1974, consenting to an indefinite extension of the statute of limitations for these years.

The indefinite waiver contained in Form 872-A can be terminated by either the IRS or the taxpayer. Under terms stated in the waiver itself, the taxpayer can only terminate the waiver by mailing Form 872-T to the IRS office considering the case; termination is not effective until and unless the IRS receives the Form 872-T. The waiver also provides that the IRS can terminate the waiver by mailing either a Form 872-T or a notice of deficiency to the taxpayer, and termination is effective upon mailing. After termination, the IRS has 90 days within which to assess any tax deficiency determined.

On December 31, 1981, the IRS mailed notices of deficiency for the years 1973 through 1976 to two former (but not last known) addresses of the Roszkos. (The IRS had been notified of the Roszkos' then current address when it issued the notices of deficiency, and the Tax Court later determined that the IRS' failure to send the notices to the last known address invalidated subsequent assessments based on the misaddressed notices.) Both notices were returned to the IRS undelivered. Thereafter, on May 24, 1982 the IRS assessed the entire deficiency alleged in the notices, with interest.

The Roszkos first learned of the unsuccessfully mailed notices through subsequent IRS collection activity. They paid the assessed tax and interest in late 1982 and early 1983. In addition, an overpayment from tax year 1984 was applied to the assessed liability.

In 1984, the Roszkos petitioned the Tax Court to declare the assessment invalid for insufficient notice under IRC Section 6212(b). The Commissioner of Internal Revenue ("Commissioner") filed a Notice of No Objection

to the Roszkos' Petition, and on November 9, 1984, the Tax Court dismissed the case for lack of jurisdiction, having found insufficient notice to support the assessment.

Contrary to the Roszkos' expectations, the IRS did not thereafter refund the taxes paid for 1973 and 1974. After a few months, the Roszkos' legal counsel contacted the IRS about the refund and was informed for the first time that the IRS was considering issuing a second set of notices of deficiency on the ground that the 872-A waivers executed in 1981 were not terminated by the issuance of the first misaddressed set of notices of deficiency. After prompting by the taxpayers, the IRS, on October 28, 1985, mailed new notices of deficiency for 1973 and 1974 to the Roszkos' correct address. On December 23, 1985, the Roszkos once again petitioned the Tax Court to dismiss their case for lack of jurisdiction, this time on the ground that the statute of limitations for 1973 and 1974 had expired upon termination of the waiver agreement in 1981.

On December 4, 1986, in an opinion reviewed by sixteen Judges of the Tax Court, fourteen Judges found that the statute of limitations on assessments for 1973 and 1974 had expired prior to the issuance by the IRS of the new notices of deficiency. (Judge Cohen concurred in the result only, Judge Parker joined Judge Simpson's dissent, and Judges Koerner and Swift did not participate.) The Tax Court reasoned that under applicable principles of contract interpretation the IRS had terminated the Form 872-A waivers of the statute of limitations by mailing the first notices of deficiency, without regard to whether the notices were misaddressed or undelivered. The Tax Court qualified this holding, however, by providing that to termi-

nate the parties' agreement, the notice of deficiency must have "the potential to advise a taxpayer of the intended termination by [the Commissioner]", apparently in recognition of the fact that an uncommunicated intent to terminate would be meaningless. The Tax Court also recognized but, in view of its holding for the taxpayers on the above issue, found it unnecessary to address the Roszkos' alternate argument that the invalid assessment terminated the waiver.

On appeal, the Court of Appeals for the Ninth Circuit vacated the decision of the Tax Court and remanded the case for further proceedings. The Court of Appeals concluded that "the Form 872-A reference to mailing a notice of deficiency was [not] intended to include a misaddressed, undelivered, and unacknowledged letter which would not qualify as a notice of deficiency in any other context." The Court of Appeals reasoned that what was meant by the reference to "a notice of deficiency" in the Form 872-A waiver was a notice of deficiency that complied with IRC Section 6212, which provides that federal income, estate and gift taxes may only be assessed after a notice of deficiency has been mailed to the taxpayer at his last known address. The Court of Appeals did not address whether the invalid assessment would have terminated the waiver even if the misaddressed notice did not.

EXISTENCE OF JURISDICTION BELOW

The Tax Court had jurisdiction over the Roszkos' Petition, for the purpose of addressing the taxpayers' motion to dismiss, under the authority of *Shelton v. Commis-*

sioner, 63 T.C. 193 (1974) and IRC Sections 6213(a) and 7442. The Ninth Circuit Court of Appeals had jurisdiction under IRC Section 7482 to review the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

I. Allowing The Decision Of The Ninth Circuit To Stand May Give Rise To A Conflict Among The Circuits.

By overruling a Tax Court decision supported by an overwhelming majority of Tax Court Judges, the Ninth Circuit Court of Appeals has set a precedent that will result in inconsistent holdings in federal tax cases throughout the country. Under the rule of *Golsen v. Commissioner*, 54 T.C. 742 (1970), *aff'd* 445 F.2d 985, *cert. denied*, 404 U.S. 940 (1971), the decision of the Court of Appeals in this case will be binding in all Tax Court cases coming out of the Ninth Circuit. For a tax case coming out of another circuit, however, it is likely that the Tax Court will continue to follow its own decision unless there is a conflicting Court of Appeals decision in the circuit in question.

Cases identical to *Roszkos* in all material respects are currently pending before the Third and Sixth Circuit Courts of Appeals. These are *Holof v. Commissioner*, [CCH Dec. 44,291(M)], T.C. Memo 1987-540 (3rd Cir. Case No. 88-1185); *Knapp v. Commissioner*, [CCH Dec. 44,819(M)], T.C. Memo 1987-178 (6th Cir. Case Nos. 87-1927 and 87-2136); and *Hubbard v. Commissioner*, (CCH Dec. 44,334(M)], T.C. Memo 1987-575 (6th Cir. Case No.

88-1390). The *Holof* case has been fully briefed and was argued in September, 1988. The *Knapp* case is scheduled for oral argument in November, 1988. If either of these cases are decided in favor of the taxpayer, it will create a conflict among the circuits. Moreover, even if both the Third and Sixth Circuit Courts of Appeals decide in favor of the Internal Revenue Service, there may still be a conflict between these courts, on one side, and the Tax Court and any Court of Appeals that upholds the Tax Court decision, on the other hand.

II. This Court Should Hear This Case To Promote Judicial Efficiency And Avoid Uncertainty In The Law.

By hearing this case, this Court would eliminate the inefficiency of repetitive appeals throughout the circuits. Even if the Courts of Appeals for both the Third and Sixth Circuits rule in favor of the IRS, it may still be necessary for the IRS to appeal from Tax Court decisions concerning taxpayers from other circuits. Given the overwhelming support of the Tax Court Judges for the decision of Judge Gerber at the trial level, it is likely that the Judges who ruled with the majority will continue to follow the rule of the Tax Court.

Finally, allowing the Ninth Circuit's decision to stand exacerbates conflict within the Tax Court itself. Judges Parker and Simpson, who dissented from Judge Gerber's opinion in the Tax Court, may find the Ninth Circuit's opinion persuasive. The fate of a taxpayer petitioning the Tax Court could well depend solely on the happenstance of which judge is assigned to his case. Such uncertainty would be inappropriate for a Court whose job it is to pro-

vide the primary interpretation of a body of law of nationwide application.

III. The Decision Of The Court Of Appeals Is Contrary To Established Rules Of Contract Interpretation.

Interpretation of IRS waiver agreements is subject to the rules governing the interpretation of contracts. *Pursell v. Commissioner*, 38 T.C. 263, 278 (1962), *aff'd per curiam*, 315 F.2d 629 (3rd Cir. 1963); *Piarulle v. Commissioner*, 80 T.C. 1035, 1042 (1983). As the Tax Court recognized, under federal law, doubtful language in a contract should be interpreted against the party who has selected the language. It has long been held that this rule is of particular significance when the drafting party is an agency of the federal government. See *Garrison v. United States*, 7 Wall. 688, 690, 19 L.Ed. 277 (1869).

In the area of government contracts generally, an even more restrictive rule is applied against the government agency: If some substantive provision of a government-drawn agreement is fairly susceptible of two reasonable constructions, the contractor's interpretation will be adopted unless the parties' intention is otherwise affirmatively revealed. *Valley View Shopping Center Limited v. United States*, 535 F.2d 42, 46 (Ct. Cl. 1976); *Sturm v. United States*, 421 F.2d 723, 727 (Ct. Cl. 1970); *WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 876-877 (Ct. Cl. 1963) and cases cited therein. The Court of Appeals, after noting this principle as one of the bases for the Tax Court decision, disregarded the principle in its own decision. In finding that the reference in the waiver to a "notice of deficiency" was not intended to include a misaddressed

notice of deficiency, the Court of Appeals found the interpretation proposed by the IRS to be controlling, even though the Roszkos' interpretation was no less reasonable.

This determination is contrary to the rule of law generally applicable to contracts involving the U.S. government. The accepted rule is that "the unexpressed, unilateral intent of one party is not sufficient to bind the other." *Singer-General Precision, Inc. v. United States*, 427 F.2d 1187, 1193 (Ct. Cl. 1970). Thus, under principles of construction for government contracts, the unexpressed, unlateral intent of the IRS to limit the intent of the reference to a "notice of deficiency" in the Form 872-A waiver agreement to properly addressed notices would not be sufficient to bind the Roszkos to that interpretation of the waiver.

IV. The Court Of Appeals' Decision Undercuts Statutory And Case Law Incentives Requiring The IRS To Use Due Care In Ascertaining The Taxpayer's Last Known Address.

The failure of the IRS to send a notice of deficiency to a taxpayer's last known address, as in the case here, violates an important statutory right. The taxpayer's right to have the notice of deficiency sent to his last known address is important, because if the taxpayer does not receive or respond to the notice, the taxes and penalties, if any, will be assessed, and the taxpayer may be required to pay the taxes and penalties before presenting his side of the audit story. IRC Secs. 6213(a) and 7421(a). If the taxpayer receives a notice of deficiency, however, he may petition the Tax Court and contest part or all of the taxes and penalties asserted without prepaying a proposed lia-

bility that may be well beyond his means. IRC Sec. 6213 (a). The taxpayer may not petition the Tax Court until the notice of deficiency has been issued. *Id.*

The courts have long recognized the importance of the taxpayer's right to a prepayment forum and have uniformly vacated any assessment not preceded by at least the mailing of a notice to the taxpayer's last known address. *Johnson v. Commissioner*, 611 F.2d 1015 (5th Cir. 1980); *Alta Sierra, Inc. v. Commissioner*, 62 T.C. 367, *aff'd* 538 F.2d 334 (9th Cir. 1976); *Sorrentino v. Ross*, 425 F.2d 213 (5th Cir. 1970); *Mulvania v. Commissioner*, 769 F.2d 1376 (9th Cir. 1985). If the statute of limitations on assessments has expired for the tax year in question, the IRS will be barred from thereafter reasserting the tax deficiency. IRC Sec. 6501(a). It has been held that it is better for the government to lose some revenue as a result of its clerical error than to deprive the taxpayer of a fair opportunity to petition the Tax Court without first having to pay the tax liability asserted. *Mulvania v. Commissioner*, *supra*, 769 F.2d at 1380.

The right to a prepayment forum is of more than merely theoretical importance. If the IRS fails to send the notice of deficiency to the taxpayer, the IRS will probably also misaddress the notice of assessment and the series of demands for payment that follow, including the notice of intent to levy against the taxpayer's assets. As here, the IRS may not seek out the taxpayer's correct address until the tax is assigned to a field officer for collection. The collections officer may initiate contact

with the taxpayer using any of several collection techniques. These include garnishment of the taxpayer's wages, the seizure of his bank account, and in extreme cases, a levy against his residence.

A taxpayer who has sufficient liquid funds can pay the tax and pursue refund procedures, although such procedures would be time-consuming and uncertain. A taxpayer who lacks the money to pay the proposed liability will have a more serious problem. If he is unable to obtain a suspension of the collection activity in court, he will face forcible collection action even if the tax deficiency lacks merit, because he will not be able to present his case until the tax is paid.

The Court of Appeals' interpretation of the waiver agreement will enable the IRS, merely by failing to exercise its usual diligence, to begin many tax cases with collection proceedings.

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CONCLUSION

The judgment below gives rise to a substantial potential conflict among the Courts of Appeals and significantly erodes an important right to a prepayment forum for tax claims. These are matters of great public importance and concern nationwide. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATED: November 3, 1988.

APPENDIX "A"

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Louis W. Roszkos; and Vivian L. Roszkos,	
Petitioners-Appellees,	No. 87-7316
v.	T.C. No. 45403-85
Commissioner of Internal Revenue,	OPINION
Respondent-Appellant.	

Appeal from the Decision
of the United States Tax Court

Argued and Submitted
May 11, 1988—San Francisco, California

Filed June 20, 1988

Before: Cecil F. Poole, Charles Wiggins and
Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti

SUMMARY

Taxation

Appeal from judgment. Vacated and remanded. The court held that the mailing of an invalid notice of deficiency does not terminate a Form 872-A waiver of the statute of limitations for assessment of tax deficiencies.

Appellees the Roszkos executed Forms 872, consenting to a limited extension of the ordinary three-year statute of limitations for assessment of tax deficiencies. Eventually, the Roszkos executed Forms 872-A consenting to an unlimited extension of the statute of limitations. The unlimited waiver in Form 872-A can be terminated by mailing a Form 872-T to the IRS office. Termination is not effective until the IRS has received the Form 872-T. The IRS can terminate the waiver by mailing either a Form 872-T or a notice of deficiency to the taxpayer. Termination is effective upon mailing. The IRS issued, by certified mail to two former addresses of the Roszkos, notices of deficiency. Both notices were returned undelivered. The Roszkos eventually learned of the unsuccessfully mailed notices. They paid the assessed tax and more than a year later petitioned the Tax Court to declare the assessment invalid for insufficient notice. The Tax Court dismissed the case. More than ten months after the dismissal, the Roszkos mailed a Form 872-T to the IRS. The IRS issued a new notice of deficiency because the IRS believed the Forms 872-A, which the Roszkos had executed earlier, remained effective to waive the statute of limitations. The Roszkos reacted to the new notice of deficiency by once again petitioning the Tax Court to dismiss their case this time on the ground that the statute of limitations had expired prior to the issuance of the new notice. The Tax Court held that the statute of limitations had expired prior to the issuance of the new notice. As a result, the court dismissed the case for lack of jurisdiction.

[1] The purported notices of deficiency were misaddressed and returned to the IRS undelivered. The Roszkos did not render harmless the IRS' error because they

did not *timely* petition the Tax Court for a determination of deficiency. As a result, the notices were null and void. [2] Form 872-T exists for a fundamentally different purpose than the deficiency notice. The former was created for the narrow purpose of terminating the Form 872-A waiver agreement, and may be sent by either party. The latter was designed for the broader purpose of notifying the taxpayer of a tax deficiency so that the taxpayer may have an opportunity to litigate the merits of the deficiency before it is assessed. That Form 872-A subjects both of these documents to a mailing standard sheds no light on the analysis.

COUNSEL

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Woodford G. Rowland, San Rafael, California, for the petitioners-appellees.

OPINION

BRUNETTI, Circuit Judge:

BACKGROUND

Louis and Vivian Roszkos ("the Roszkos") filed joint federal tax returns for the years 1973 through 1976, reflecting losses incurred and investment credits for various partnerships in which they participated. The Internal Revenue Service ("IRS") initiated an investigation of those returns. In connection with that investigation, the Roszkos executed periodic Forms 872, consenting to a limited extension of the ordinary three-year statute of limitations for assessment of tax deficiencies. *See* IRC § 6501(a).

Eventually, in late 1981, the Roszkos executed Forms 872-A for tax years 1973 and 1974, consenting to an unlimited extension of the statute of limitations. The unlimited waiver in Form 872-A can be terminated by either the IRS or the taxpayer. The taxpayer can only terminate the waiver by mailing a Form 872-T to the IRS office "considering the case," and termination is not effective until the IRS has received the Form 872-T. The IRS can terminate the waiver by mailing either a Form 872-T or a notice of deficiency to the taxpayer, and termination is effective upon mailing. Upon termination, the IRS has ninety days within which to assess a tax deficiency, if any.

On December 31, 1981, the IRS issued, by certified mail to two former (but not last known) addresses of the Roszkos, duplicate notices of deficiency for tax years 1973 through 1976. It is clear that the IRS had been notified of the Roszkos' then current address when the 1981 notices of deficiency were sent to the Roszkos' former addresses. The alleged deficiency totaled approximately $75,000, primarily relating to tax years 1973 and 1974. Both notices were returned to the IRS undelivered, the Roszkos never having received them. Thereafter, on May 24, 1982, the IRS assessed the entire deficiency, with interest.

Through subsequent IRS collection activity, the Roszkos first learned of the unsuccessfully mailed notices. They paid the assessed tax and interest in late 1982 and early 1983. More than a year later, on June 11, 1984, the Roszkos petitioned the Tax Court to declare the assessment invalid for insufficient notice pursuant to IRC § 6212(b)(1), and to dismiss their case for lack of jurisdiction. The Commissioner of Internal Revenue ("Commissioner") filed a no-

tice of no objection to the Roszkos' petition; and on November 9, 1984, the Tax Court dismissed the case for lack of jurisdiction, having found insufficient notice to support the assessment.

On September 16, 1985, more than ten months after the dismissal, the Roszkos mailed a Form 872-T to the IRS. The Roszkos assert that they mailed this Form 872-T in order to prompt the IRS to refund the taxes they had paid relative to the now invalid assessment for tax years 1973 and 1974. They included on the Form the following additional language:

> This Notice of Termination is filed without a waiver of the taxpayers' position that the time to assess tax for the years in question has expired, based on the Services' mailing of a notice of deficiency on December 31, 1981.

The Roszkos maintain that this language was included to emphasize that they considered their Form 872-A waiver of the statute of limitations to have been terminated more than three years earlier. In response, the IRS issued, on October 28, 1985, by certified mail to the Roszkos' current address, a new notice of deficiency for tax years 1973 and 1974. The new notice of deficiency covered tax years 1973 and 1974 because the IRS believed the Forms 872-A, which the Roszkos had executed for those years, remained effective to waive the statute of limitations. The new notice did not cover tax years 1975 and 1976 because the Roszkos had never executed Forms 872-A for those years, and the Commissioner concedes that the statute of limitations had expired for tax years 1975 and 1976. On November 25, 1985, the IRS refunded to the Roszkos all pay-

ments they had made relating to the invalid 1982 assessment.

The Roszkos reacted to the new notice of deficiency by once again petitioning the Tax Court, on December 23, 1985, to dismiss their case for lack of jurisdiction, this time on the ground that the statute of limitations had expired prior to the issuance of the new notice. One week later, the Roszkos paid the IRS the amount of the alleged deficiency.

On December 4, 1986, the Tax Court held that the statute of limitations had expired prior to the issuance of the new notice.[1] The Court reasoned that the IRS had terminated the Form 872-A waivers of the statute of limitations by mailing the first notices of deficiency, albeit unsuccessfully, almost five years earlier. As a result, the Court dismissed the case for lack of jurisdiction.[2]

The Commissioner appeals the Tax Court decision. We review decisions of the Tax Court on the same basis as District Court decisions in civil bench trials. *Mayors v.*

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[1]Judge Gerber's Tax Court opinion, *Roszkos v. C.I.R.*, 87 T.C. 1255 (1986), was joined by twelve other judges. Judge Cohen concurred in the result only, Judge Parker joined Judge Simpson's dissent, and Judges Koerner and Swift did not participate.

[2]The Tax Court's order dismissing the case for lack of jurisdiction was vacated and replaced on February 12, 1987 by an order of summary judgment (*i.e.*, that there was no deficiency). The latter order was entered in response to the Commissioner's motion to have the Court comply with IRS § 7459(e). The February 12 order was itself vacated and replaced on April 15, 1987 by an order of summary judgment directing the parties to compute the amount of the Roszkos' overpayment. On June 11, 1987, the Tax Court entered its final decision regarding the overpayment, from which the Commissioner appeals.

C.I.R., 785 F.2d 757, 759 (9th Cir. 1986). The issue on appeal is whether the mailing of a concededly invalid notice of deficiency terminates a Form 872-A waiver of the statute of limitations for assessment of tax deficiencies. Interpretation of these waiver agreements is subject to the rules governing interpretation of contracts, *see Pursell v. Commissioner*, 38 T.C. 263, 278 (1962), *aff'd per curiam*, 315 F.2d 629 (3d Cir. 1963); and when, as in this case, the lower court based its decision on the language of the agreement and principles of contract interpretation, the decision is one of law which we review de novo. *See Miller v. Safeco Title Insurance Co.*, 758 F.2d 364, 367 (9th Cir. 1985).

DISCUSSION

The critical language of the Form 872-A waiver agreement is as follows:

> *The amount of any federal income tax due on any return(s) made by or for the above taxpayer(s) for the period ended December 31, 19[xx], may be assessed on or before the 90th (ninetieth) day after*: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s), or (b) *the Internal Revenue Service mails a Notice of Deficiency for such period(s).* However, if a Notice of Deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the Notice of Deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days.

(Emphasis added). The Commissioner argues that mailing a notice of deficiency which does not satisfy the statutory requirements for notice set forth in IRC § 6212 was

not an act which the parties contemplated would terminate the above agreement.

In rejecting the Commissioner's position, the Tax Court looked to the literal terms of the agreement, resolving doubtful terms against the drafting party, namely the IRS. The Tax Court also looked to case law governing notices of deficiency in general. Its holding rests on two central conclusions. First, in drafting Form 872-A, the Commissioner has enabled the IRS to terminate the agreement by the simple act of mailing, thereby rendering irrelevant the accuracy of the address. *See Roszkos*, 87 T.C. at 1260-61. Second, although a misaddressed notice is a "nullity" for assessment purposes, it is still a notice of deficiency for purposes of the waiver. *See id.* at 1263. Although we agree with the method of the Tax Court's analysis, we are compelled to reject its conclusions.

To focus on the distinction between a "mailing" standard and a "receipt" standard is to ignore the basic function of the notice of deficiency. As provided in IRC § 6212, the notice of deficiency has a distinct and unambiguous purpose. Its very name denotes that it was intended to serve as a vehicle of notification. Indeed, it follows that a notice of deficiency which does not satisfy the minimum statutory requirement for notice cannot reasonably be considered a notice of deficiency.

In *Clodfelter v. C.I.R.*, 527 F.2d 754 (9th Cir. 1975), *cert. denied*, 425 U.S. 979 (1976), we discussed the interplay between the mailing standard and the function of the notice of deficiency. We stated "that the legislative plan contemplates that actual notice of the deficiency should be given where such can reasonably be achieved and that the

mailing authorized by § 6212(a) is a means to that end." Thus, even though § 6212(b)(1) provides for a mailing standard, which removes a great burden from the IRS, that standard has built-in features which give the notice great potential to reach the taxpayer—certified or registered mail, and last known address.

Apparently recognizing that the mailing standard for a notice of deficiency is founded in the principle of actual notice, the Tax Court stated: "[W]e believe that an improperly addressed notice of deficiency or Form 872-T which does not have the potential to advise a taxpayer of the intended termination by [the IRS], would not suffice to terminate the parties' agreement." *Roszkos*, 87 T.C. 1255, 1261 (1986). However, in the face of this accurate analysis of the law, the Tax Court proceeded to misapply its own principle. It concluded that the ill-fated notices of deficiency in this case became cloaked with the necessary "potential to advise" when, at some unspecified time after the mailing, the Roszkos became aware of the mailing. This conclusion, the court believed, was "conceptually analogous to the case law governing notices of deficiency . . . ." *Id.* at 1261-62.

Whatever tenuous analogy can be drawn between the Tax Court's position and case law governing notices of deficiency is wholly contrary to the clear precedent of this court. In *Mulvania v. C.I.R.*, 769 F.2d 1376 (9th Cir. 1985), we confronted the question of whether the notice requirement of § 6212 was satisfied when a taxpayer learned of, but did not receive, the misaddressed notice of deficiency. We held that a misaddressed notice of deficiency, which is returned to the IRS undelivered, is "null and

void." The only exception to this scenario that we noted is if the taxpayer acknowledges notice by timely petitioning the Tax Court for a redetermination of deficiency, thereby rendering harmless the IRS' error in mailing. *Id.* at 1379-81.

[1] In the present case, the purported notices of deficiency were misaddressed and returned to the IRS undelivered. The Roszkos did not render harmless the IRS' error because they did not *timely* petition the Tax Court for a determination of deficiency. In fact, there is nothing in the record to indicate that the Roszkos discovered, within ninety days, *see* IRC § 6213, that notices of deficiency had been mailed to their former addresses. As a result, the notices which were mailed on December 31, 1981, were null and void. "Regardless of the coincidence by which [the taxpayer] later came to know of its existence, the taxpayer's actual knowledge did not transform the void notice into a valid one." *Mulvania*, 769 F.2d at 1380-81.

We see no reason to conclude that the Form 872-A reference to mailing a notice of deficiency was intended to include a misaddressed, undelivered, and unacknowledged letter which would not qualify as a notice of deficiency in any other context. Rather, interpreting the reference to include only valid notices gives meaning to the entire excerpt of the waiver form which we have set out above. That excerpt is devoted to the topic of when the IRS may assess a tax deficiency for the period covered by the waiver. In most cases a deficiency shall not be assessed until after a notice in compliance with § 6212 is mailed, *see* IRC § 6213(a).

The Tax Court rationalizes its decision to give effect to a statutorily invalid notice of deficiency by comparing the notice to a Form 872-T. The Court notes that the waiver agreement enables the IRS to terminate the waiver simply by mailing either a notice of deficiency or a Form 872-T. The Court reasons that because there is no statutory requirement that a Form 872-T be properly addressed, the statutory requirements for the notice of deficiency should be disregarded for purposes of the waiver agreement. *See Roszkos*, 87 T.C. at 1261.

[2] Although we express no opinion relative to Form 872-T, we reject the Tax Court's rationale. Form 872-T exists for a fundamentally different purpose than the notice of deficiency. The former was created for the narrow purpose of terminating the Form 872-A waiver agreement, and may be sent by either party. The latter, which may also be used by the IRS as a vehicle of termination, was designed for the broader purpose of notifying the taxpayer of a tax deficiency so that the taxpayer may have an opportunity to litigate the merits of the deficiency before it is assessed. That Form 872-A subjects both of these documents to a mailing standard sheds no light on the analysis. As discussed earlier, however, we find the statutory requirements surrounding the notice of deficiency to be quite illuminating, and we choose not to disregard them.

We therefore hold that a notice of deficiency must comply with § 6212 in order to terminate a Form 872-A waiver. The Roszkos' contention that such a holding will deny them due process of law is both unfathomable and without merit. Because the notices mailed on December

31, 1981 did not comply with § 6212, the May 24, 1982 assessment was invalid, the Form 872-A waiver did not terminate, and the statute of limitations for assessing a deficiency for the Roszkos' 1973 and 1974 tax years did not expire.

Accordingly, the Tax Court order entered June 11, 1987 is vacated, and the case is remanded to the Tax Court for further proceedings not inconsistent with this opinion.

APPENDIX "B"

LOUIS E. ROSZKOS AND VIVIAN L. ROSZKOS, PETITIONERS v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 45403-85 Filed December 4, 1986.

P and R executed an open-ended consent (Form 872-A) to extend the period for assessment. R sent two notices of deficiency to addresses which were not P's "last known address." P did not receive the notices and R assessed and collected the tax from P. The terms of the consent provided for termination if R mailed a notice of deficiency or assessed the tax. More than 90 days after the mailing of the two notices, P petitioned this Court and then moved for dismissal on grounds that the notices were not sent to P's "last known address" and R posed no objection. We dismissed. R mailed a new notice of deficiency to P which would be timely mailed of the open-ended consent has not been terminated by the prior two notices and assessment. P contends the statute has expired and respondent contends that the earlier two notices and assessment were a "nullity" and had no effect upon the consent. R contends, in the alternative, that he can invoke jurisdiction of this Court under the holding in *Wallin v. Commissioner*, 744 F.2d 674 (9th Cir. 1984), *Held*, the consent was terminated when P subsequently became aware of the notices during the collection process. *Held, further*, the holding in *Wallin v. Commissioner, supra*, is not available to R to force P into court on the merits where R's lack of diligence is the foundation for such equitable relief.

Woodford G. Rowland, for the petitioners.

Thomas M. Rohall, for the respondent.

GERBER, *Judge*: Respondent, in a notice of deficiency dated October 28, 1985, determined deficiencies in peti-

tioners' 1973 and 1974 Federal income taxes in the amounts of $33,178 and $36,136, respectively. Petitioners filed a timely petition reflecting a legal residence of Alamo, California. Petitioners, on January 21, 1986, moved to dismiss for lack of jurisdiction on the ground that respondent's October 28, 1985, notice was mailed beyond the 3-year statutory period within which to assess tax. The circumstances preceding the issuance of the notice are unique and give rise to the following novel issues: (1) Whether a notice of deficiency which is not mailed to the last known address is sufficient to terminate an open-ended consent (Form 872-A) to extend the assessment period; and (2) where respondent has not exercised reasonable diligence in determining a taxpayer's last known address, may respondent invoke the jurisdiction of this Court under the holding in *Wallin v. Commissioner*, 744 F.2d 674 (9th Cir. 1984), revg. a Memorandum Opinion of this Court.

FINDINGS OF FACT

Petitioners' 1973 and 1974 taxable years were under consideration by respondent. Several consents to extend the statute of limitations on assessment were executed periodically by the parties. Eventually, the parties executed a Special Consent to Extend the Time to Assess, Form 872-A (rev. July 1979). Form 872-A is essentially an open-ended consent, the pertinent terms of which are as follows:

taxpayer(s) * * * and [respondent] consent and agree as follows: (1) The amount(s) of any Federal ——— tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended ——— may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T,

Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 (six) months after this agreement ends.

During October 1980 and September 1980, the Forms 872-A were executed for petitioners' 1973 and 1974 taxable years, respectively. On December 31, 1981, respondent mailed duplicate original notices, of deficiency to petitioners' former addresses at Oak Ridge, Tennessee, and Seattle, Washington. Petitioners did not receive either of the duplicate original notices, and on May 24, 1982, respondent assessed the full amount of the 1973 and 1974 income tax deficiencies. Petitioners paid the assessed tax and interest late in 1982 and early in 1983. About 2½ years later, during June 1984, petitioners petitioned to this Court and then moved for a dismissal for lack of jurisdiction on the ground that the December 31, 1981, notice was not sent to their "last known address" in accord with section 6212(b)(1).[1] Respondent, by a September 12, 1984, notice, advised of no objection to our granting petitioners' motion to dismiss.[2] On November 9, 1984, we ordered the dismissal of docket No. 17824-84 due to respondent's failure to mail a notice of deficiency to petitioners' last known address.

Following the dismissal of docket No. 17824-84 petitioners, on September 16, 1985, mailed a Notice of Termination of Special Consent to Extend the Time to Assess Tax, Form 872-T (rev. August 1984), to respondent con-

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[1]All statutory references are to the Internal Revenue Code of 1954 as amended and in effect during the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

[2]It is clear that respondent was aware of petitioners' then current Alamo, California, address when the 1981 notices of deficiency were sent to petitioners' former addresses. The 1981 notices were returned to respondent with the notations: "Moved, Not Forwarded" and "Moved Left No Address."

cerning the 1973 and 1974 taxable years. The text of Form 872-T, following identifying information including the taxable years involved, reads:

> Under the agreement dated ———, between the above taxpayer(s) and the Internal Revenue Service, this form is written notification of termination of Form 872-A * * * for the kind of tax and tax period(s) indicated above.

Petitioners added the following language to the Form 872-T:

> This Notice of Termination is filed without waiver of the taxpayers' position that the time to assess tax for the years in question has expired, based on the Service's mailing of a notice of deficiency on December 31, 1981.

On November 25, 1985, respondent refunded all payments of the 1973 and 1974 assessed and collected deficiencies, plus interest, to petitioners. On October 28, 1985, respondent mailed a notice of deficiency for 1973 and 1974 to petitioners' correct address. Petitioners initiated this case by filing a timely petition which respondent answered. For a second time, petitioners have moved to dismiss the 1973 and 1974 taxable years, due to lack of jurisdiction. On this occasion, however, petitioners contend that respondent's notice of deficiency (dated October 28, 1985) was not mailed prior to the expiration of the period within which tax for 1973 and 1974 could be assessed by respondent. Respondent's response to petitioners' motion is that the period for assessment is open because the 1980 Forms 872-A (open-ended consents) were never terminated and, if they were terminated, the holding in *Wallin v. Commissioner*, 744 F.2d 674 (9th Cir. 1984), revg. a Memorandum Opinion of this Court, confers jurisdiction upon this Court.

OPINION

The issues presented have not been addressed in a published opinion of this Court. We must first determine whether either the mailing of a notice of deficiency to the wrong address (not the "last known address") or the assessment of the tax based upon such a notice is sufficient to terminate an open-ended consent extending the assessment period.

Over the years, respondent has designed various forms by which the parties to a tax audit or controversy could agree to extend the statutory period for assessment under section 6501(c)(4). Initially, the agreements (Forms 872) were designed to extend the assessment period for a finite period. A second type of agreement (Form 872-A) was then designed to permit an open-ended extension or waiver of the statutory period until one of several enumerated events occurred. Respondent announced the new Form 872-A in Rev. Proc. 71-11, 1971-1 C.B. 678. Several administrative and legal problems were encountered with respect to the new Form 872-A.[3] In an attempt to remedy these shortcomings, respondent revised and announced new procedures with respect to Form 872-A in Rev. Proc. 79-22, 1979-1 C.B. 563. Under the revised Form 872-A (rev. July 1979) used in this case, the open-ended consent terminates after: (1) Respondent *receives* a Form 872-T; (2) respondent *mails* a Form 872-T; (3) respondent *mails* a notice of deficiency; or (4) the deficiency is finally *assessed*.

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[3]In *Johnson v. Commissioner*, 68 T.C. 637 (1977), we held correspondence between the appellate division and the taxpayer, advising that a notice of deficiency was to be sent, sufficient to terminate the Form 872-A agreement. The terms of the earlier version of Form 872-A did not specifically require the mailing of the notice.

Respondent has structured the agreement, or consent, to his administrative advantage. The taxpayer may not terminate the consent without respondent's actual knowledge or at least receipt of a Form 872-T from the taxpayer.[4] On the other hand, respondent may terminate by simply mailing either a notice of deficiency or a Form 872-T. It is clear that there is no express requirement that a taxpayer receive the Form 872-T or notice of deficiency for the consent to be terminated. The parties herein have acted in a somewhat unorthodox manner to avail themselves of benefits they perceive to exist in respondent's revised procedures. Petitioners paid the tax and waited several years to air their defense to the assessment.[5] Petitioners then tested respondent's mettle by sending a protective Form 872-T. Respondent answered by refunding the tax payments and mailing a new notice of deficiency to petitioners. Now petitioners ask us to dismiss for lack of jurisdiction due to respondent's alleged inability to issue a notice of deficiency.[6]

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[4]In addition to the receipt requirement, taxpayers are also required to use the form provided by respondent, Form 872-T. See *Grunwald v. Commissioner*, 86 T.C. 85, 89 (1986).

[5]Petitioners could have filed a complaint in the U.S. District Court or Claims Court seeking a refund of the 1973 and 1974 income tax deficiencies they had paid. Instead, they waited several years to file a petition in our Court and to request its dismissal for lack of jurisdiction. The alternative selected by petitioners did not insure the return of the taxes paid. Because the 3-year statute had, under petitioners' theory, expired during 1982, we presume that petitioners may not have been aware of their statute of limitation defense at the time they paid the tax during the latter part of 1982 and early part of 1983.

[6]Although petitioners have couched their motion as one to dismiss for lack of jurisdiction, it more properly goes to the

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Respondent's position is that the 1981 notice of deficiency was a "nullity." Respondent argues that a notice of deficiency must meet the statutory requirements of section 6212 to effectively terminate a Form 872-A agreement. Further, respondent argues that petitioners did not receive actual notice of the 1981 notice of deficiency and could not have relied upon it. Finally, respondent points out that "in order to terminate an 872-A, notice of one party's intent to terminate must be *communicated* to the other party." We find respondent's position that the notice must be communicated to be somewhat of a paradox when considered in conjunction with the express terms of the Form 872-A and the procedures outlined in Rev. Proc. 79-22, 1979-1 C.B. 563. There would also be a lack of continuity and reason with the principle that a notice of deficiency may satisfy the requirements of sections 6212 and 6213 even though it is never received at the "last known address"[7] (*Luhring v. Glotzbach*, 304 F.2d 556 (4th Cir. 1962)), or improperly addressed without chance of delivery and notice, but the taxpayer becomes aware of it and timely petitions this Court (*Clodfelter v. Commis-*

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merits of those taxable years. If we find that the statutory period for assessment and collection has expired, either the second notice is ineffective or petitioners have a complete defense to any determination, assessment, or collection of tax for their 1973 and 1974 taxable years. This motion could be and is alternatively considered one for summary judgment under Rule 121.

[7]It appears that respondent designed the 1979 Form 872-A, in part, for his own administrative convenience and to comport with the statutory requirement of mailing, which contains no requirement of receipt by the taxpayer.

sioner, 527 F.2d 754, 757 (9th Cir. 1975), affg. 57 T.C. 102 (1971); *Goodman v. Commissioner*, 71 T.C. 974, 977-978 (1979)).

A consent to extend the period for assessment is essentially a unilateral waiver of the taxpayer's defense and it is not a contract. *Stange v. United States*, 282 U.S. 270 (1981); *Piarulle v. Commissioner*, 80 T.C. 1035, 1042 (1983). "Contract principles are significant, however, because section 6501(c)(4) requires that the parties reach a written agreement as to the extension. The term 'agreement' means a manifestation of mutual assent. S. Williston, Contracts 6 (3d ed. 1957)." *Piarulle v. Commissioner*, *supra* at 1042.

Respondent has attempted to interpret and characterize the language and meaning of the terms in the Form 872-A to meet his current predicament. It is clear to us that respondent placed a higher standard on the taxpayers than on himself by requiring actual receipt by respondent before a Form 872-A consent may be terminated by the taxpayer. It is also clear that the terminology used by respondent did not require receipt by a taxpayer of respondent's Form 872-T or notice of deficiency. Respondent's argument that a notice of deficiency that does not in every respect comply with section 6212 is a "nullity," ignores respondent's ability to terminate a Form 872-A consent by simply mailing a Form 872-T to the taxpayer. There is no corresponding statutory requirement that the address be correct on a Form 872-T. If respondent had wished to use an actual notice or "communication" standard, he should have incorporated it in the terms of the

revised consent form.[8] On the other hand, we believe that an improperly addressed notice of deficiency or Form 872-T which does not have the potential to advise a taxpayer of the intended termination by respondent, would not suffice to terminate the parties' agreement. This rationale is in line with the case law regarding notices of deficiency. In this case, however, petitioners became aware of the undelivered notices of deficiency sometime between the mailing of the 1981 notices and the payment of the tax during 1982 and 1983. Considering those two events together (mailing of the notices and petitioners' later knowledge of same), the purpose of the mailing notice and its intended effect upon the Form 872-A consent have been achieved. We believe this to be a fair reading of the parties' agreement, ostensibly insuring some possibility of success in notification of termination. Furthermore, this result is conceptually analogous to the case law governing notices of deficiency which may provide parallel procedures and results regarding the effect of notices of deficiency upon the parties. See *Clodfelter v. Commissioner*, *supra*, and *Goodman v. Commissioner*, *supra*.

It is fundamental that doubtful language in a contract should be interpreted against the party who has selected the language. *Moulor v. American Life Insurance Co.*, 111 U.S. 335 (1884); *In re Rule's Estate*, 25 Cal. 2d 1, 152 P.2d 1003, 1009 (1944). This principle is especially pertinent here where respondent is asking us to ignore the literal terms of the consent in a manner favoring himself. The essential question we seek to answer is not whether the

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[8]Nothing herein is intended to preclude respondent from revising the terms of Form 872-A.

1981 notices are notices of deficiency within the meaning of section 6212,[9] but whether respondent intended to and did terminate the effect of the Form 872-A by mailing a notice of deficiency, mailing a Form 872-T, or assessing the deficiency in dispute.

Respondent offers some case precedents which he believes to be "similar or identical" to this case. In *Commissioner v. DeLeve*, 748 F.2d 465 (8th Cir. 1984), the parties had entered into a Form 872-A agreement. Thereafter, the taxpayer voluntarily petitioned in bankruptcy. Respondent mailed a notice of deficiency after the commencement of the bankruptcy proceeding. Several years later, the taxpayers moved for summary judgment in the Bankruptcy Court on the ground that the notice of deficiency terminated the Form 872-A agreement and that, accordingly, the statutory period for assessment had expired. The Eighth Circuit Court of Appeals affirmed the District Court's holding that section 6871(a) permits immediate assessment without resort to section 6218(a) deficiency procedures and that the notice of deficiency was a nullity. *Commissioner v. DeLeve, supra.* The rationale underlying the Eighth Circuit's holding is that the deficiency procedure is obviated and respondent is statutorily unable to issue a notice of deficiency.

The *DeLeve* rationale is dependent upon the intervening bankruptcy provisions and the practical or actual in-

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[9]We have already decided, based upon petitioners' motion and respondent's notice of no objection that the 1981 notices of deficiency did not meet the requirements of sec. 6212. That question concerned our jurisdiction and respondent's ability to assess without further "deficiency procedures."

capacity of respondent to issue a notice of deficiency under section 6871. Stated another way, the attempt to issue or mail a notice of deficiency where respondent has the authority to immediately assess the tax and where this Court could not acquire jurisdiction or consider the merits is of no effect or could be considered a "nullity."

When respondent mailed the 1981 notices of deficiency in this case, there was no such impediment as existed in *DeLeve*. Although the 1981 notices did not meet the "last known address" requirement of section 6212(b), they were not a "nullity" for purposes of the Form 872-A agreement, but they were notices of deficiency with statutory defects.[10] Indeed, respondent, assessed and collected the income tax deficiencies determined in the 1981 notices.[11]

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[10]Although we have held that notices of deficiency not mailed to a taxpayer's last known address are a "nullity," we have so held in connection with the notices' compliance with sec. 6212(b). *Reddock v. Commissioner*, 72 T.C. 21 (1979). The use of the word "nullity" in those cases must be factored in with the holding in *Clodfelter v. Commissioner*, 527 F.2d 754 (9th Cir. 1975), affg. 57 T.C. 102 (1971), where the defect is cured by actual notice and the successful petitioning of our jurisdiction.

[11]When respondent assessed and collected the 1973 and 1974 income tax deficiencies based upon the defective notice, from which petitioners were unable to petition, petitioners were or became possessed of an affirmative statute of limitation defense. If in that situation respondent was not aware of the defect in the notice or petitioners did not raise the affirmative defense, the tax and interest would not be returned to petitioners. Accordingly, an argument could be made that the assessment of the 1973 and 1974 tax deficiencies during 1982 was an event described in the Form 872-A which, upon communication to petitioners of the fact of assessment, could have terminated the agreement. Rrespondent has argued that an assessment based upon a notice which is a "nullity" is not an assess-

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In *Lefebvre v. Commissioner*, T.C. Memo. 1984-202, affd. per curiam 758 F.2d 1340 (9th Cir. 1985), we considered whether the Form 872-A had been properly executed. Respondent contends that the parties' failure in that case to contest a similar intervening notice with a wrong address provides precedential value to our Memorandum Opinion which is germane to this case. We strongly disagree and find that *Lefebvre v. Commissioner, supra*, is not on point.[12] Because we have found that the notices of deficiency under the circumstances of this case terminated the parties' Form 872-A consent, respondent has asked us, in the alternative, to find that we nevertheless have jurisdiction over the parties and the subject matter under the holding of *Wallin v. Commissioner*, 744 F.2d 674 (9th Cir. 1984), revg. a Memorandum Opinion of this Court. Respondent's position and the rule of law given to us in *Wallin v. Commissioner, supra*, are not readily evident without an understanding of the factual background and the legal history.

The *Wallin* case presents a common fact pattern where taxpayers seek to "justify" their otherwise untimely petitions by showing that respondent did not issue or mail a notice of deficiency in compliance with sections 6212 and

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ment within the meaning of the agreement. Respondent's position is not without merit, but due to our holding that petitioners' actual knowledge of the notice acquired during the collection process cured the address defect, we need not reach respondent's position.

[12]Respondent also directed our attention to an unpublished Memorandum Sur Order of this Court. Such memoranda by their unpublished status bespeak their lack of precedential value beyond the litigants to which they are addressed.

6213. Eve Watson (Eve) had filed her 1977 Federal individual income tax return reflecting her social security number and Alaska address. Within the next several months she moved twice, took up residence in Washington, and married Robert Wallin. Eve filed a joint return for 1978 and 1979 reflecting a Washington address and using the name "Wallin." Eve's social security number was reflected in the "lower box" provided for the spouse of the first named taxpayer. Eve did not separately notify respondent of her change of name or address. In connection with the 1980 audit of Eve's 1977 return, respondent's agent attempted to contact Eve at her Alaska address, but correspondence was returned by the Post Office as "undeliverable" and there was no forwarding address. Respondent's agent checked State of Alaska motor vehicle records and Internal Revenue Service Center records for Alaska by name and social security number and was not able to find a more current address. It was further determined that there was no record of Eve's filing a 1978 or 1979 Federal return as a resident of Alaska. The notice of deficiency for Eve's 1977 taxable year was sent to her Alaska address, and it was returned to respondent marked "unclaimed." Shortly thereafter respondent assessed the 1977 income tax deficiency and it was assigned to an officer for collection. The collection officer was not able to determine Eve's whereabouts from the Internal Revenue Service Center records because the spousal social security number was not searched. The collection office finally located Eve by means of an inquiry of the Social Security Administration. Eve was contacted concerning her 1977 taxable year (and with regard to the fact that a notice of deficiency had been sent to her Alaska address) by means

of a certified letter mailed to her on September 11, 1981. Eve's petition was received by this Court on October 13, 1981.

In our Memorandum Opinion (T.C. Memo. 1983-52) we found Eve's petition to be untimely, because it was not filed within 90 days of respondent's mailing of the notice of deficiency. As a premise to finding the petition was filed untimely, we first found that respondent's notice to the taxpayer was mailed to her "last known address." Generally, the address reflected on a return is the "last known address" unless the taxpayer sends a clear and concise notification to respondent directing a change of address. *Alta Sierra Vista, Inc. v. Commissioner*, 62 T.C. 367, 374-375 (1974), affd. without published opinion 538 F.2d 334 (9th Cir. 1976); *Looper v. Commissioner*, 73 T.C. 690, 696-697 (1980). Respondent is bound to exercise reasonable diligence in ascertaining a taxpayer's correct address. *Maxfield v. Commissioner*, 153 F.2d 325, 326 (9th Cir. 1946); *Alta Sierra Vista, Inc. v. Commissioner, supra* at 374. The standards or duties placed upon taxpayers and respondent usually meet or intersect at some point. It is at that point that the responsibility shifts from the taxpayer to respondent. The case law has held taxpayers to a higher standard than respondent. "Administrative realities demand that the burden fall upon the taxpayer to keep the Commissioner informed as to his proper address." *Alta Sierra Vista, Inc. v. Commissioner, supra* at 374.

In those instances where a taxpayer has made no specific attempt to communicate a new address (this assumes that respondent has become aware that the address reflected on the return is no longer correct), respondent is generally entitled to rely on the address shown on the

return. Respondent should also be aware of address information acquired in the district where the return was filed (i.e., *Keeton v. Commissioner,* 74 T.C. 377 (1980)). The Ninth Circuit has placed a higher standard of responsibility upon respondent. In *Cool Fuel, Inc. v. Connett,* 685 F.2d 309, 312-313 (9th Cir. 1982), the circuit affirmed the District Court's holding that would require the Commissioner to search beyond the district in which the subject return was filed. See also *Welch v. Schweitzer,* 106 F.2d 885 (9th Cir. 1939). In addition to broadening the geographical scope, the Ninth Circuit has placed a more rigorous burden on respondent by requiring a thorough search of his records even where a taxpayer has not directly communicated any change of address.

Without direct notification of Eve's move and name change, we held that respondent's district-wide search was sufficient to satisfy the "reasonable diligence" standard. The Ninth Circuit reversed, holding that respondent did not exercise diligence in Eve's case because he did not perform a computer search for social security numbers in both "the primary taxpayer's box and the spousal taxpayer's box." In remanding Eve's case to our Court, the Circuit Court instructed us "to file, as timely," Eve's petition concerning her 1977 tax year. No supporting rationale or analysis of section 6212 or 6213 was provided by the Circuit Court regarding its instruction to treat the petition as timely.[13]

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[13]Eve's petition was received and filed more than 90 days after respondent's attempt at issuance and mailing of a notice of deficiency for 1977 and about 30 days after her actual knowledge of the notice.

Section 6212 permits the filing of a petition within 90 days of the mailing of a notice of deficiency. The Circuit Court's opinion varies from the statutory language in that it would appear to permit the filing of a petition at any time within 90 days of the time a taxpayer acquired knowledge of a notice of deficiency which was not addressed to the taxpayer's last known address.[14] Appeal of this case lies in the Ninth Circuit and we are bound to follow the holding in *Wallin v. Commissioner, supra. Golsen v. Commissioner,* 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971), cert. denied 404 U.S. 940 (1971).

The Ninth Circuit could have granted Eve Wallin's motion to dismiss[15] and respondent would have been barred

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[14]The reasoning of the Ninth Circuit's holding, when followed to a logical conclusion, is procedurally troublesome. It may result in litigation long after tax records and witnesses are available. There would be no statutory limit upon the parties and it may promote uncertainty. We commend the Circuit Court's concern for equity and fairness in providing a forum without payment of the tax, but the holding appears to confer jurisdiction upon this Court which may not have been statutorily mandated. The jurisdiction of this Court was legislatively conferred and has generally been narrowly construed. *Commissioner v. Gooch Milling & Elevator Co.,* 320 U.S. 418 (1943). A valid petition is the basis of this Court's jurisdiction and to be valid a petition must be filed in response to a valid notice of deficiency. *Stamm International Corp. v. Commissioner,* 84 T.C. 248, 252 (1985); *Midland Mortgage Co. v. Commissioner,* 73 T.C. 902 (1980).

[15]In *Wallin v. Commmissioner,* 744 F.2d 674 (9th Cir. 1984), revg. a Memorandum Opinion of this Court, the taxpayer and respondent filed cross-motions for dismissal dut to lack of jurisdiction. The taxpayer contended that the notice of deficiency was invalid and the statutory period for assessment had run so that respondent had no capacity to issue a new notice or assess and collect the tax based upon the invalid notice. Respondent

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from assessing or collecting a 1977 deficiency in income tax. The Circuit Court chose to place the parties in our Court on the merits without providing guidelines or rationale. Respondent argues that "the Ninth Circuit is concerned about petitioners who may not have a forum to contest the merits of the * * * notice and * * * the loss to the government fisc that a dismissal would bring." Respondent also speculates that the Circuit Court did not wish to generate a windfall to Eve Wallin for nothing more than a "clerical error." Respondent obviously believes he is or should be a beneficiary of the type of relief granted to Eve Wallin. We disagree.

The Circuit Court's opinion appears to be grounded on equitable principles. We assume that the Circuit Court was more concerned with the taxpayer's ability to obtain a hearing on the merits without first paying the tax, rather than the "fisc." This assumption is strongly suggested factually in *Wallin v. Commissioner, supra,* where the Circuit Court held it was respondent's failure to exercise reasonable diligence in seeking out the correct address. We do not feel constrained to allow respondent to benefit by his lack of diligence in these circumstances, where petitioners do not wish a trial on the substantive merits, but

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contended that the notice was valid and the petition was untimely permitting assessment and collection of the tax. Under respondent's contention, the taxpayer would have been able to contest the merits of her 1977 tax year by paying the tax and suing for a refund. Under the taxpayer's contention, the merits of the 1977 tax year would have been res judicata.

are seeking to fend off respondent on the theory that the statutory period for assessment has expired.[16]

Since we hold that the statute of limitations on assessment for 1973 and 1974 has expired, petitioners' motion for summary judgment (see note 6 *supra*) is granted.

To reflect the foregoing,

An appropriate order will be entered.

Reviewed by the Court.

STERRETT, CHABOT, NIMS, WHITAKER, SHIELDS, HAMBLEN, CLAPP, JACOBS, WRIGHT, PARR, WILLIAMS, and WELLS, *JJ.*, agree with the majority opinion.

COHEN, *J.*, agrees with the result only.

KORNER and SWIFT, *JJ.*, did not participate in the consideration of this case.

SIMPSON, *J.*, dissenting: I must disagree with the majority's interpretation of the extension agreement. My understanding of contract law is that the cardinal principle of interpretation is that the Court should attempt to give effect to the intentions of the parties to the agreement, and I believe that the majority has lost sight of that objective. 3 A. Corbin, Contracts, sec. 538 (Supps. 1960 & 1971); 1 Restatement, Contracts 2d, sec. 202 (1979); 4 S. Williston, Contracts, sec. 601 (3d ed. 1961 & Cum.

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[16] A myriad of additional administrative and legal questions remain unanswered as a result of the Circuit Court's holding in *Wallin v. Commissioner, supra,* but need not be considered on these facts.

Supp. 1986). Additionally, in interpreting a contract, "technical terms and words of art are given their technical meaning when used in a transaction within their technical field," unless the parties have manifested a different intention. Restatement, *supra* at sec. 202(3).

Section 6501 establishes the various statutes of limitation on the time within which the Commissioner must act. However, a taxpayer and the Commissioner may agree to extend those times. Historically, an extension was for a fixed period. Whether the parties were operating under the statutory limitations or under a limitation established by an extension agreement, the Commissioner knew when he had to act—he knew that if he did not issue a notice of deficiency and commence the tax collection procedures by the known date, he would forego his right to collect the tax.

In this case, we have a new type of an extension agreement: under it, the extension continues indefinitely, but it can be terminated by either party. It can be terminated by either party giving notice of his intention to terminate, but if it is terminated in that manner, the Commissioner is given a period of time within which to issue his notice of deficiency and commence the tax collection procedures. To avoid the Commissioner's having to issue a notice of termination followed by a notice of deficiency, the agreement also provides that it can be terminated simply by the Commissioner's issuing a notice of deficiency. When the notice of deficiency is issued, both parties will then have their days in court to dispute the merits of the claimed deficiency.

The Court's interpretation of the agreement has undermined these arrangements. In the earlier case, the taxpayer asked the Court to set aside the assessment on the ground that the notice of deficiency was invalid, and the Court granted that request. Now the taxpayer asks the Court to hold that the notice of deficiency was effective to terminate the extension because he learned of it in 1982, and the Court is granting that request. As a result of these two decisions, the Court has construed the agreement so as to deprive the Commissioner of any right to come to Court to claim a deficiency, and to relieve the taxpayer from any claimed deficiency without his having to prove that he did not owe such deficiency.

Surely, no one can doubt that when the parties executed the extension, they contemplated that it could only be terminated by a Form 872-T or a notice of deficiency that would be effective under section 6213 to commence the tax collection procedures, or that would have been their contemplation if they had thought about the matter. Yet, as a result of this decision, it will be necessary for the Commissioner to revise his Form 872-A to make clear that the consent is terminated by a notice of deficiency that is effective under section 6213, but this taxpayer will enjoy the windfall of never having to prove that he did not owe the tax claimed by the Commissioner.

PARKER, *J.*, agrees with this dissent.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS E. ROSZKOS; and VIVIAN L. ROSZKOS,	)	
	)	No. 87-7316
Petitioners-Appellees	)	
	)	T.C. No. 45403-85
v.	)	
	)	ORDER
COMMISSIONER OF INTERNAL REVENUE,	)	(Filed August 5, 1988)
Respondent-Appellant.	)	

BEFORE: POOLE, WIGGINS, and BRUNETTI, Circuit Judges

Appellees' petition for rehearing is denied.

APPENDIX "D"

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6212. NOTICE OF DEFICIENCY.

(a) [as amended by Sec. 89(b), Technical Amendments Act of 1958, Pub. L. No. 85-866, 72 Stat. 1606, and Sec. 1906(b)(13)(A), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520]. *In General.*—If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B * * *, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) *Address for Notice of Deficiency—*

(1) [as amended by Sec. 76, Technical Amendments Act of 1958, *supra*, and Sec. 1906(b)(13)(A), Tax Reform Act of 1976, *supra*] *Income and gift taxes.*—In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A * * * if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A * * * and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

* * * * *

SEC. 6213. RESTRICTIONS APPLICABLE TO DEFICIENCIES; PETITION TO TAX COURT.

(a) [as amended by Secs. 1204(c)(6), and 1906(a)(15) Tax Reform Act of 1976, *supra*] *Time for Filing Petition and Restriction on Assessment.*—Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in

the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851 or section 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A or B * * * and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

* * * * *

(c) [as amended by Sec. 1906(b)(13), Tax Reform Act of 1976, *supra*] *Failure to File Petition.*—If the taxpayer does not file a petition with the Tax Court within the time prescribed in subsection (a), the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Secretary.

* * * * *

SEC. 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) [as amended by Sec. 165(a), Excise Tax Technical Changes Act of 1958, Pub. L. No. 85-859, 72 Stat. 1275.] *General Rule.*—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceed-

ing in court without assessment for the collection of such tax shall be begun after the expiration of such period.

* * * * *

(c) *Exceptions.*—

* * * * *

(4) [as amended by Sec. 1906(b)(13)(A), Tax Reform Act of 1976, *supra.*] *Extension by agreement.*—this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11, both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

SEC. 6502. COLLECTION AFTER ASSESSMENT.

(a) *Length of Period.*—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

* * * * *

SEC. 6503. SUSPENSION OF RUNNING OF PERIOD OF LIMITATION.

(a) *Issuance of Statutory Notice of Deficiency.*—

(1) [as amended by Sec. 1016(a)(15)(A),

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 and Sec. 1906(b)(13)(A), Tax Reform Act of 1976, *supra.*] *General rule.*—The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212 (a)) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

* * * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) [as amended by Sec. 110(c), Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125; Sec. 1204(c)(11), Tax Reform Act of 1976, *supra;* and Sec. 9(b)(1), Act of November 10, 1978, Pub. L. No. 95-628, 92 Stat. 3627] *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

Department of the Treasury—Internal Revenue Service

SPECIAL CONSENT TO EXTEND THE TIME TO ASSESS TAX

Form 872-A
(Rev. July 1979)

In reply refer to:
E:RPM

Louis E. Roszkos and Vivian L. Roszkos
(Name(s))

taxpayer(s) of 151 Newport Drive Oakridge, Indiana 37380
(Number, Street, City or Town, State, Zip Code)

and the District Director of Internal Revenue or Regional Director of Appeals consent and agree as follows:

(1) The amount(s) of any Federal Income [kind of tax] tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1973, may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service office considering the case receives Form 872-T, Notice of Termination of Special Consent to Extend the Time to Assess Tax, from the taxpayer(s); or (b) the Internal Revenue Service mails Form 872-T to the taxpayer(s); or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the

agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement; (b) tax in jeopardy; (c) tax to correct mathematical or clerical errors; (d) tax reported on amended returns; and (e) advance payments. In addition, unassessed payments, such as amounts treated by the Service as cash bonds and advance payments not assessed by the Service, will not terminate this agreement before the expiration. This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the Joint Committee on Taxation submitted under section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the Service may credit or refund the tax within 6 (six) months after this agreement ends.

Signature instructions are on the back of this form. Making this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.

Your signature here—/s/ Louis E. Roszkos 10/8/80
(Date Signed)

Spouse's signature—/s/ Vivian L. Roszkos 10:8:80
(Date Signed)

Taxpayer's representative
Sign here—
Corporate name—
Corporate officer(s) sign here—
James W. Caldwell

REGIONAL DIRECTOR OF APPEALS
District Director of Internal Revenue

/s/ J. D. McKenzie, RRM 10/8/80
(Date Signed)

Form 872A Department of the Treasury—Internal Revenue Service—In Reply refer to: Projects 082380-2181 Special Consent to Extend the Time to Assess Tax (for the Period Ended December 31, 1974)

Louis Roszkos & Vivian Roskos taxpayer(s) of 151 Newport Dr., Oak Ridge, TN 37830 and the District Director of Internal Revenue or Regional Director of Appeals consent and agree to the following:

(1) The amount of any federal income tax due on any return(s) made by or for the above taxpayer(s) for the period ended December 31, 1974, may be assessed on or before the 90th (ninetieth) day after: (a) the Internal Revenue Service Office considering the case receives form 872-T, notice of termination of special consent to extend the time to assess tax, from the taxpayer(s), or (b) the Internal Revenue Service mails form 872-T to the taxpayer(s), or (c) the Internal Revenue Service mails a notice of deficiency for such period(s). However, if a notice of deficiency is sent to the taxpayer(s), the time for assessing the tax for the period(s) stated in the notice of deficiency will be further extended by the number of days the assessment was previously prohibited, plus 60 days. A final adverse determination subject to declaratory judgment under Sections 7428, 7476, or 7477 of the Internal Revenue Code will not terminate this agreement.

(2) This agreement ends on the earlier of the above expiration date or the assessment date of an increase in the above tax that reflects the final determination of tax and the final administrative appeals consideration. An

assessment for one period covered by this agreement will not end this agreement for any other period it covers. Some assessments do not reflect a final determination and appeals consideration and therefore will not terminate the agreement before the expiration date. Examples are assessments of: (a) tax under a partial agreement, (b) tax in jeopardy, (c) tax to correct mathematical or clerical errors, (d) tax reported on amended returns, and (e) advance payments. In addition, unassessed payments, such as amounts treated by the service as cash bonds and advance payments not assessed by the service, will not terminate this agreement before the expiration.

This agreement ends on the date determined in (1) above regardless of any assessment for any period includible in a report to the joint committee on taxation submitted under Section 6405 of the Internal Revenue Code.

(3) This agreement will not reduce the period of time otherwise provided by law for making such assessment.

(4) The taxpayer(s) may file a claim for credit or refund and the service may credit or refund the tax within 6 (six) months after this agreement ends.

(5) The amount of any deficiency assessment is to be limited to that resulting from: (1) any carryover tax effects caused by adjustments to any prior tax return, (2) any adjustments to the partner's distributive share of any item of income, gain, loss, deduction, or credit of: fads in cinema, partnership(s), (3) any adjustments which affect the tax basis of the partner's interest(s) in the aforementioned partnership(s), and (4) any amount result-

ing from statutory computations or recomputations based on such adjustments, the provisions of Sec. 6511(c), Internal Revenue Code of 1954, are limited to any refund or credit resulting from adjustments for which the period of assessment is extended under this agreement.

Making this consent will not deprive the taxpayer(s) of any appeal rights to which they would otherwise be entitled.

Your Signature Here /s/ Louis Roszkos — 9/4/80 (Date Signed)

Spouse's Signature /s/ Vivian Roszkos — 9/4/80 (Date Signed)

Taxpayer's Representative Sign Here _____ (Date Signed)

Corporate Name _____

Corporate Officer(s) _____ (Title) (Date Signed)

Sign Here _____ (Title) (Date Signed)

District Director of Internal Revenue

By /s/ _____ (Signature and Title) 4/19/80 (Date Signed)

Instructions

If this consent is made for a year for which a joint return was filed, both husband and wife must sign the orignal and copy of this form unless one, acting under a

power of attorney, signs as agent for the other. The signatures must match the names as they appear on Page 1 of this form.

If you are an attorney or agent of the taxpayer(s), you may sign this consent provided the action is specifically authorized by a power of attorney. If the power of attorney was not previously filed, please include it with this form.

If you are acting as a fiduciary (such as executor, administrator, trustee, etc.) and you sign this consent, attach Form 56, Notice of Fiduciary Relationship, unless it was previously filed.

If the taxpayer is a corporation, sign this consent with the corporate name followed by the signature and title of the officer(s) authorized to sign.